(2)

No. 90-529

Supreme Court, U.S.
FILED
JAN 18 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD L. MILLER, ET AL., PETITIONERS

v.

DONALD RICE, SECRETARY OF THE AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

BARBARA C. BIDDLE
CONSTANCE A. WYNN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

The Survivor Benefit Plan (SBP), 10 U.S.C. 1447-1455, creates an annuity program for retiring members of the military. The SBP includes an offset provision, 10 U.S.C. 1451(e)(3), under which annuity payments must be reduced by the amount of Social Security survivor benefits to which the annuitant "would [be] entitled" based on the military service of the decedent. The questions presented are:

1. Whether the government permissibly interpreted the offset provision to provide for reduction of payments to certain annuitants, even though those annuitants do not actually receive survivor benefits.

2. Whether the government's interpretation of the offset provision violates any contractual rights.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

~~*Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986)~~	
K Mart Corp. v. *Cartier, Inc.*, 486 U.S. 281 (1988)	6
National R.R. Passenger Corp. v. *Atchison, T. & S. F. Ry.*, 470 U.S. 451 (1985)	8
NLRB v. *United Food & Commercial Workers*, 484 U.S. 112 (1987)	7
Office of Personnel Management v. *Richmond*, 110 S. Ct. 2465 (1990)	8
Sullivan v. *Everhart*, 110 S. Ct. 960 (1990)	8

Statutes:

Department of Defense Authorization Act of 1986, Pub. L. No. 99-145, Tit. VII, § 711, 99 Stat. 666-670	2
Survivor Benefit Plan Amendments of 1985, 10 U.S.C. 1447-1455	2
10 U.S.C. 1448(a)(2)	2
10 U.S.C. 1451	2
10 U.S.C. 1451(a)(1)(B)	2
10 U.S.C. 1451(d)	2
10 U.S.C. 1451(e)	3
10 U.S.C. 1451(e)(3)	2
10 U.S.C. 1451(e)(3)(A)	5
10 U.S.C. 1452	2

Statutes—Continued: Page

42 U.S.C. 402(e) (1) (D) 3
42 U.S.C. 402(e) (2) 6
42 U.S.C. 415 6

Miscellaneous:

S. Rep. No. 1089, 92d Cong., 2d Sess. (1972) 2, 7

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-529

RICHARD L. MILLER, ET AL., PETITIONERS

v.

DONALD RICE, SECRETARY OF THE AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13-24) is reported at 907 F.2d 957. The opinion of the district court (Pet. App. 25-40) is reported at 700 F. Supp. 1565.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1990. The petition for a writ of certiorari was filed on September 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1972, Congress established the Survivor Benefit Plan ("SBP" or "Plan"), 10 U.S.C. 1447-1455, to provide income to surviving spouses of retired members of the military. S. Rep. No. 1089, 92d Cong., 2d Sess. 1 (1972). To participate in the SBP, members of the military must, upon becoming eligible to retire, be married or have dependent children. 10 U.S.C. 1448(a)(2); Pet. App. 18. When participants actually retire, they contribute 10% of their retirement pay to remain in the Plan. 10 U.S.C. 1452.

After an SBP participant dies, his or her surviving spouse begins receiving monthly annuities. If the surviving spouse is under 62 years old, the annuity is equal to 55% of the deceased's retirement pay. 10 U.S.C. 1451. When the annuitant reaches 62, the annuity is subject to the Social Security offset provision. 10 U.S.C. 1451(e)(3). Under the offset provision,

> [a]n annuity * * * shall be reduced by * * * the amount of the survivor benefit, if any, to which the widow or widower would be entitled under title II of the Social Security Act * * * based solely upon service by the person concerned * * * and calculated assuming that the person concerned lives to age 65 * * *.

Section 1451(e)(3).[1]

---

[1] In 1985, Congress eliminated the Social Security offset. Department of Defense Authorization Act of 1986, Pub. L. No. 99-145, Tit. VII, § 711, 99 Stat. 666-670 (codified as amended at 10 U.S.C. 1451). Under the amendments, when the annuitant reaches the age of 62, his or her SBP annuity is reduced from 55% to 35% of the decedent's retired pay. 10 U.S.C. 1451(a)(1)(B) and (d). The 1985 amendments

With regard to annuitants aged 62 and older, the government reduces all annuities by the amount of the Social Security survivor benefits for which the annuitant would be eligible based on the military service of the deceased spouse. Some annuitants do not actually receive such survivor benefits because they are entitled to old-age insurance benefits under the Social Security Act in a greater amount. Individuals do not receive survivor benefits if they are entitled to old-age insurance benefits in an amount that exceeds the amount of survivor benefits for which they would otherwise be eligible. 42 U.S.C. 402 (e)(1)(D).

2. The three petitioners are a participant in the SBP, a potential annuitant under the SBP who expects to qualify under the Social Security Act for old-age insurance benefits rather than survivor benefits, and an actual annuitant under the SBP who receives old-age insurance benefits rather than survivor benefits. Pet. App. 27-29. They sued respondents, who have various responsibilities for administration of the SBP, in the District Court for the District of Wyoming. Petitioners sought declaratory, injunctive, and monetary relief, based on theories of (1) breach of contract by the government; and (2) equitable estoppel. Pet. App. 16, 29-30.

On cross-motions for summary judgment, the district court ruled in petitioners' favor on a different basis from either of those advanced by petitioners. In the court's view, the government's interpretation of the offset provision conflicted with the "plain language" of the SBP statute. Pet. App. 30-35. The court held that "the Social Security offset should not

---

do not apply in this case. See 10 U.S.C. 1451(e); Pet. App. 18 n.3, 27.

be made against SBP benefits when the beneficiary is receiving Social Security old age payments." *Id.* at 30. The court further held that the SBP gave petitioners contract rights that were violated by the government's improper application of the offset provision to annuitants in their situation. *Id.* at 36-39.

3. The court of appeals reversed. Pet. App. 13-24. It held that the government's interpretation of the offset provision "follow[ed] the 'plain meaning' of the statute," and was "at a minimum, a 'permissible one' under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)." Pet. App. 22. After quoting the provision, the court reasoned:

> The critical language in the statute is "would be entitled" and "based solely upon the service by [the deceased spouse]." Under Title II of the Social Security Act, a person is not ordinarily entitled to survivor benefits if the person's own old-age benefits exceed the amount of the survivor benefits. However, solely for the purpose of determining the amount of offset, the statute mandates that the amount be determined by looking to the Social Security survivor benefit that "would be" payable to the surviving spouse based on the military service of the decedent. * * * "Would be entitled" is not the equivalent of "is entitled" and the former is sufficiently broad to include the situation where a person would otherwise be entitled to a Title II survivor benefit but because of the triggering of another statutory provision will not actually be eligible to receive, nor * * * actually receive payment of the benefit. The Social Security offset is concerned with how the offset will be calculated, not the actual entitlement for Title II survivor benefits.

Id. at 21-22. The court found it unnecessary to decide whether the SBP created contract rights. "[A]ny 'contract' which [petitioners] conceivably had with the government" was governed by the statute, which permitted reduction of their SBP payments pursuant to the offset provision. *Id.* at 23-24. Like the district court, the court of appeals did not address petitioners' estoppel theory. *Id.* at 17.

ARGUMENT

1. Petitioners contend (Pet. 8-9) that the offset provision applies only to annuitants who actually receive survivor benefits under the Social Security Act. The court of appeals correctly rejected that contention.

As the court of appeals recognized (Pet. App. 17-22), petitioners' contention ignores the language of the offset provision. The statute provides that

> An annuity * * * shall be reduced by * * * the amount of the survivor benefit, if any, to which the widow or widower would be entitled * * * based solely upon the service by the person concerned * * * and calculated assuming that the person concerned lives to age 65 * * *.

10 U.S.C. 1451(e)(3)(A). The text of the provision makes clear that the offset is a hypothetical figure. The offset is to be calculated based on the assumption that the annuitant (1) "would be entitled" to survivor benefits in an amount (2) "based solely" on the deceased's military service and (3) "assuming that" the deceased had lived to age 65. In each of those respects, the language of the provision indicates that the offset should be determined without regard to the actual receipt of survivor benefits. The court of appeals therefore correctly concluded (Pet. App.

22) that the statute is "sufficiently broad" to apply "where a person would otherwise be entitled to a * * * survivor benefit but because of the triggering of another statutory provision will not actually * * * receive payment of the benefit."

Petitioners arrive at a contrary interpretation by focusing exclusively on the word "entitled" in the offset provision. See Pet. 8-9. This argument ignores the conditional phrase "would be" that precedes the word "entitled": Petitioners read the statute as if it provided for reduction in the amount of benefits to which an annuitant "*is* entitled." As the court of appeals observed (Pet. App. 22), "[w]ould be entitled" is not the equivalent of "is entitled." Because petitioners' interpretation of the offset provision disregards essential statutory terms, the court of appeals properly rejected it and upheld the government's interpretation of the provision. See *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988) (statute must be construed as a whole).

Moreover, even under petitioners' interpretation, the offset provision, once triggered, requires calculation of a hypothetical figure, i.e., one that is based on only the deceased's military service and on the assumption that the deceased lived to age 65.[2] To this extent, petitioners recognize that Congress intended the receipt of survivor benefits to be irrelevant in calculating the offset.

---

[2] The amount of survivor benefits that an annuitant actually receives will often reflect non-military employment by the deceased. See 42 U.S.C. 402(e)(2) (survivor benefit generally equal to primary insurance amount); 42 U.S.C. 415 (computation of primary insurance amount). Moreover, survivor benefits, in contrast to the offset, are *not* calculated based on the assumption that the deceased lived until 65. See 42 U.S.C. 402(e)(2).

As the court of appeals concluded (Pet. App. 22-24), the government's interpretation plainly represents a permissible reading of the statute. Indeed, it represents the more natural reading, in light of Congress's clearly expressed intent that, to some extent at least, the offset was to be calculated without regard to the amount of survivor benefits actually received. Furthermore, the government's interpretation is consistent with legislative history indicating Congress's intent to "integrate" SBP benefits with social security benefits. S. Rep. No. 1089, 92d Cong., 2d Sess. 29 (1972). The government's interpretation treats an annuitant the same whether the annuitant is receiving survivor benefits or a greater amount of old-age benefits. Under petitioners' reading, in contrast, an annuitant receiving old-age benefits would receive higher annuity payments than one receiving a lesser amount of survivor benefits, even if the deceased in each case contributed the same amount of military pay to the Plan. Petitioners point to nothing in the text of the offset provision or its legislative history that would require this disparity in treatment.[3]

In sum, the government's interpretation of the offset provision in the SBP is "rational and consistent with the statute." *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987). Under "well established" principles of review, that interpretation was properly sustained by the court of ap-

---

[3] Petitioners suggest (Pet. 3, 4, 8) that an annuitant should be rewarded if, by virtue of the annuitant's own employment, the annuitant qualifies for old-age benefits rather than survivor benefits. Petitioners do not cite anything in the language of the SBP statute or its legislative history, however, to show that Congress intended to confer such a reward.

peals. See *Sullivan* v. *Everhart*, 110 S. Ct. 960, 964 (1990).

2. Petitioners further contend (Pet. 5-6) that the SBP statute gave them contract rights that were violated by application of the offset provision to reduce their SBP payments. The discussion above disposes of this contention. As the court of appeals held (Pet. App. 23-24), even if the SBP created a contract between the government and participants, the terms of that contract are governed by the statute. Because the statute permits the government to apply the offset provision to annuitants in petitioners' situation, the government's application of that provision does not violate any contract rights petitioners may have.

In any event, legislation cannot be construed as creating a contract unless Congress has "clearly and unequivocally" expressed an intent to enter into a contractual agreement. *National R.R. Passenger Corp.* v. *Atchison, T. & S. F. Ry.*, 470 U.S. 451, 466 (1985). Nothing in the language of the SBP or its legislative history indicates such an intention. For this reason, the court of appeals was correct in rejecting petitioners' contract claims.[4]

---

[4] Petitioners also claim (Pet. 9-10) that the government was estopped from applying the offset provision to reduce their SBP payments. The issue was not considered by either of the courts below, see Pet. App. 17, and should not be considered by this Court in the first instance. And in any event, estoppel is plainly unavailable in a case such as this. See *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465 (1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

BARBARA C. BIDDLE
CONSTANCE A. WYNN
Attorneys

JANUARY 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20307